IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 1336 OF 2004

Smt. Satif Iqbal ... Petitioner

V/s

The State of Maharashtra & ors. ... Respondents

Mr. Maqsood Khan for the petitioner.

Mr. D.S. Mhaispurkar, A.G.P. for the respondents.

CORAM: R.M.S. KHANDEPARKAR & P. V. KAKADE, JJ.

DATED: 11TH JANUARY, 2005.

ORAL JUDGMENT (Per Khandeparkar, J.):-

1. Heard. Perused the record.

2. The petitioner has challenged the order of detention dated 20.4.2004 passed under Sec. 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as the "COFEPOSA") by the respondent No.2 - the detaining authority, against one Iqbal Yusuf Suleman, husband of the petitioner.

3. The facts leading to the detention of said Iqbal are that -

Upon 5.2.2004 at about 17.00 hrs. said Iqbal was scheduled to travel by Oman Air Flight No. WY-0808 to Dubai via Muscat. Pursuant to the intelligence report received by the officers of Directorate of Revenue Intelligence (DRI), Mumbai, Zonal Unit, said Iqbal would be carrying huge quantity of foreign currency concealed in his baggage and would be trying to smuggle the same out of India without declaration in respect thereof to the Custom authorities, surveillance was maintained on the departure side of Module 2A, CSI Airport, Sahar, Mumbai. At about 16.45 hrs., the D.R.I. Officers noticed Iqbal carrying one medium size black coloured trolley bag and a black coloured pouch, at which time he was intercepted by the officers. At that time, Iqbal was about to climb the step ladder connected to the aircraft to board the said flight. Initially he denied about carrying any contraband goods, but on persistent questioning by the officers, he admitted that he was carrying some foreign currency in his hand baggage without declaration to the Customs authorities.

Panchas were called to witness the proceeding while he was escorted to the office of the Rest Room of Custom officers situated on the 1st floor, Module 2A, C.S.I. Airport, Sahar, Mumbai and in the course of examination of the trolley bag, one brown coloured polythene packet wrapped with cellophane tapes was found therein and on tearing open the said cellophane tape, one bundle of assorted foreign currency containing UAE Dirham 1,34,000/- and Quatari Riyals 7000 of different denominations as described in the grounds in support of the detention order, were recovered which were of the value equivalent to Rs.17,98,900/- and the same were seized by the officers under the provisions of the Customs Act, 1962. The statement of Iqbal was recorded on 6.2.2004 under Sec. 108 of the Customs Act, 1964. It was followed by search of residential premises of Iqbal at 101, Bhandari Street, Kathawala Bldg., 1st floor, Room No. 09, Mumbai - 400 003. Apart from initial statement, further statements were recorded under Sec. 108 of the Customs Act of Iqbal upon 12.2.2004 as well as 25.2.2004. Various statements of other persons were also recorded in the course of investigation. After considering the materials collected in the course of the investigation, the

sponsoring authority prepared the proposal for taking preventive action against Iqbal and forwarded the same to the detaining authority upon 22.3.2004. After going through the procedural requirements and the Deputy Secretary having endorsed the proposal, the detention order came to be passed on 20.4.2004. It was served upon Iqbal on 21.4.2004 alongwith the accompanying documents.

4. The impugned order is sought to be challenged firstly on the ground that the bare perusal of the impugned order alongwith the grounds in support thereof discloses non-application of mind by the detaining authority, inasmuch as, that the authority has failed to take note of the fact that the investigation did not disclose existence of all the persons who were referred to in various statements stated to have been made by the detenu under Sec. 109 of the Customs Act; and secondly, that the very allegation about the detenu having found in possession of a bag of foreign currency is unbelievable in the facts and circumstances as according to the authority itself it had prior information that the detenu would be carrying the foreign currency with him on being delivered by one of

the airport officer and that there was surveillance maintained at the air port and yet there was no evidence forthcoming regarding any such delivery of the bag of currency by any of the air-cract officer to the detenu. If there was any such prior information and the surveillance was maintained, then why the detenu could not be intercepted at the time of such delivery of bag by the officer to the detenu. Therefore, the entire allegation regarding carrying of foreign currency by the detenue at the relevant time is a concocted story.

5. The contentions of the petitioner in that regard are sought to be countered by the detaining authority contending that the survieillance at the air-port where the passenger used to enter after completing Custom migration and security check up was pursuant to the intelligence report to the effect that the detenu would be carrying huge amount of foreign currency concealed in his hand bag with intention to smuggle the same out of India and the intelligence report was not to the effect that it would be delivered by any air-port officer to the detenu. As regards the different persons named in the statements of the detenu, the investigation has revealed that some of the names disclosed were

fictitious and particularly in relation to the employees of the concerned Oman airlines. The said facts were sufficiently corroborated by the facts disclosed in the statements of the detenu. There was no question of arresting the other persons named in the statements as some of them were fictitious and the said fact was revealed in the course of investigation.

6. The learned advocate appearing for the petitioner has also sought to rely upon the decision in the matter of **Khudiram Das v/s State of West Bengal & ors. (A.I.R. 1975 SC 550); (2) Mohd. Abubukar Marwari v/s Union of India & ors. (1982 Cri.L.J. 53); and (3) Jai Singh & ors. v/s State of Jammu & Kashmir (A.I.R. 1985 SC 764),** in support of his contention regarding non-application of mind while passing the impugned order as well as the entire allegations regarding the attempt to smuggle foreign currency being false and without any substance.

7. The Apex Court in Khudiram Das’s case has clearly held that the satisfaction of the detaining authority must be on the materials which are of rationally probative value. According to the learned advocate for

the petitioner, once it is disclosed that the authority had failed to take note of the fact that there was no attempt made by the investigation agency to ascertain and to get facts stated in the statements of the detenu being confirmed, the reference to the names of the persons in the statements, it would disclose the relevant materials having rational probative value were totally ignored while arriving at the alleged satisfaction of the order of detention and that would vitiate said order. It cannot be disputed that in case the detaining authority ignores the lapse on the part of the investigation machinery to ascertain whether the persons named in the statements are really in existence or not, it could amount to a serious lapse on the part of the detaining authority while arriving at the satisfaction of the need of detention. The detaining authority in its affidavit, in the grounds in support of the detention order has clearly stated that some of the names disclosed in the statement were fictitious, whereas some names relate to the officers of the Oman Air Lines and the same has been confirmed by the statements of the concerned officers of the Oman Air Lines. Being so, the contention of the learned advocate for the petitioner that there was lapse on the part of

the detaining authority in ignoring the alleged fact about non-existence of the persons named in the statements is to be held as devoid of substance. Being so, the decision of the Apex Court in Khudiram Das's case is of no help to the petitioner to contend that the impugned order is vitiated on the alleged ground of non-application of mind as the impugned order does not disclose the alleged lapse on the part of the detaining authority.

8. The Division Bench of this Court in **Mohomood Abubukar Marwari's** case had held that though there was material with the concerned authorities, the existence of material is one thing and sifting and scanning thereof is altogether different. It was further held that sifting and scanning of material is one thing and drawing and formulating conclusions therefrom is again a process altogether different and this stage is very important as if a person's liberty is to be circumscribed and restrained, the authority intending to do so is expected to take the proper care and precaution in that behalf. It has also been observed therein that, it is not that liberty cannot be restrained but formulation, framing and signing of the grounds by the

detaining authority at about the time of making the order of detention is an important assurance and a safeguard inter-alia on the question that there was material; that the said material was scanned and sifted; that the irrelevant, if any, was rejected and the relevant only relied upon; that thereafter conclusions were drawn and grounds formulated therefrom; and there was thus, at the relevant time, a case for detention was made out, although under the subjective but bona fide satisfaction of the detaining authority. The contention on behalf of the petitioner is that the detaining authority totally ignored absence of any material about delivery of the bag containing the foreign currency to the detenu and lapse on the part of the investigating machinery to intercept the concerned officer of the Oman Air Lines who is said to have delivered such bag to the detenu at the time of delivery of the bag, inspite of prior intelligence report that there would be such delivery of bag to the detenu by the Air Lines officer. As already stated above, the grounds in support of detention order as well as the affidavit in reply clearly reveal that the intelligence report was to the effect that the detenu would attempt to smuggle the foreign currency out of India having carried the

same in the hand baggage. There was no intelligence report regarding possible delivery of the bag or currency by any Air Lines officer to the detenu. Being so, there was no occasion for the detaining authority to consider this aspect in the manner it was sought to be argued on behalf of the petitioner. Being so, there was no question of scanning or sifting the evidence in that regard and for the same reason the decision of the Division Bench in Mohd. Abubukar's case can be of no help to the petitioner to assail the impugned order while contending that the same discloses non-application of mind.

9. The second ground of challenge to the impugned order is that the detaining authority failed to consider that the passport of the detenu having been seized and there being no allegation that the detenue had travelled on any fake passport at any point of time, the detaining authority ought to have considered as to whether in such circumstances the detention of the Iqbal detenu under COFEPOSA was at all necessary and failure to consider the same discloses non-application of mind by the detaining authority and in that regard reliance is placed upon **Jai Singh's** case (Supra) as well as on

Rajesh Gulati v/s Govt. of N.C.T. of Delhi & anr. (2002 (6) SC 37. In Jai Singh's case, the Apex Court had observed that -

> "There is nothing to indicate that the District Magistrate applied his mind to the question whether the order of detention under Jammu & Kashmir Safety Act was necessary despite the fact that the petitioner was already in custody in connection with criminal case."

In **Rajesh Gulati's** case, it was held that -

> "The likelihood of the appellant indulging in smuggling activities by the appellant was in any case effectively fore-closed by the retention of his passport by the customs department. The detaining authority noted that the appellant's passport was with the customs department and yet he said "but you are likely to travel clandestinely for the purpose of smuggling". Now none of the instances of smuggling by the appellant as stated in the impugned detention order describe the appellant

> as having travelled without a passport for the purpose of smuggling. The conclusion that despite the absence of his passport the appellant could or would be able to continue his activities is based on no material but was a piece of pure speculation on the part of the detaining authority."

Referring to these decisions and drawing attention to the fact that the passport of Iqbal was already seized and contending that there was no material on record to disclose that Iqbal at any point of time was involved in clandestine travel or on any fictitious passport, it is sought to be contended that the same discloses non-application of mind as well as unwarranted restriction upon the movements of the detenu within the country and hence the order being vitiated.

10. The learned advocate appearing for the respondents, drawing attention to the decisions of the Division Bench in the case of **Mohan Chaturmal Daryani v/s State of Maharashtra & ors., reported in 2004 (3) Mh.L.J. 637** as well as the Apex Court ruling in **Sitthi Zuraina Begum v/s Union of India, reported in 2002 A.I.R. S.C.W. 4807,**

submitted that the facts of the case, as revealed from the impugned order, alongwith the grounds of detention and further explained in the affidavit clearly justify the impugned order of detention and mere absence of material regarding clandestine travel or travel on fictitious passport would not vitiate the impugned order as even without actual travel beyond the country the detenu is capable of being involved in smuggling of foreign currency with the assistance of Air Line employees and that having been revealed from the grounds of detention and having been considered by the detaining authority, the impugned order does not suffer from any irregularity or illegality.

11. The grounds of detention in support of the impugned order would disclose reference to the various facts revealed in the statements of the detenu as well as other material on record about development of friendship between the detenu and Oman Air Lines' members. It also discloses as many as 200 trips of the detenu to Dubai since 1997. It discloses the contacts of the detenu having been developed with business persons in Dubai as well as modelities adopted by the detenu for converting Indian currency into foreign currency. The modelity

adopted for delivering the foreign currency to the detenu at the airport by the Oman Air Lines staff members and consideration of all these facts and every related facts to these facts which disclose the activities on the part of the detenue in relation to the attempt to smuggle the foreign currency outside India which apparently discloses that the smuggling activities are not merely restricted to actually carrying the foreign currency by the detenu personally but also discloses his involvement in such activities and for mere seizure of the passport that itself would lead to a conclusion that it would put an end to such activities on the part of the detenu. In fact, as rightly submitted by the learned counsel for the respondents, this aspect was considered by the Division Bench in **Mohan Chhaturmal Daryani's** case, wherein after taking note of the Apex Court decision in **Rajesh Gulati'**s case, it was observed that -

> "One main distinguishing feature in respect of the present case and the case of Rajesh Gulati is that, in the present case the detenu is not in custody but he has been granted bail, thus, in our view, seizure or retention of his passport would not be enough to cripple his

> smuggling activities and we say so for the reasons hereinafter."

The learned advocate for the petitioner has not been able to point out any material which could distinguish the present case from the case of Mohan Chhaturmal wherein the above quoted observations have been made.

12. The Apex Court also in **Sitthi Zuraina Begum's** case, after taking note of its earlier decision in Rajesh Gulati's case, has revealed thus -

> "Nor can we confine the meaning of the word 'smuggling' only to going out of country and coming back with goods which are contraband or to evade duty but may encourage such activities as well by dealing in such goods."

Being so, mere seizure of the passport or mere restrictions imposed on that count on a person cannot be a justification to contend that the detention order passed to avoid the person from being engaged in the smuggling activities would be without application of mind.

13. The impugned order is also sought to be challenged on the ground that the detaining authority failed to take into consideration as to how normal remedy under normal punitive act would not suffice in the facts and circumstances of the case and how the order of detention was necessary and in that regard reliance is sought to be placed in the decision of the Apex Court in **Kanchanlal v/s State of Gujarat, reported in A.I.R. 1979 SC 1945.** The Apex Court, in this case, has held that -

> "The ordinary criminal process is not to be circumvented or short-circuited by ready resort to preventive detention. But, the possibility of launching a criminal prosecution is not an absolute bar to an order of preventive detention. Nor is it correct to say that if such possibility is not present to the mind of the detaining authority, the order of detention is necessary bad."

The Apex Court, at the same time, has ruled that -

> "However, the failure of the detaining authority to consider the possibility of launching a criminal prosecution may, in the circumstances

> of a case, lead to the conclusion that the detaining authority had not applied its mind to the vital question whether it was necessary to make an order of preventive detention."

In other words, the Apex Court has held that in a given case, it may perhaps be necessary for the detaining authority to consider the possibility of launching a criminal prosecution before passing the detention order but it is not that in each and every case such a consideration is must. It would depend on facts of each case. The Apex Court in **Kanchanlal's** case has further observed that -

> "Where an express allegation is made that the order of detention was issued in a mechanical fashion without keeping present to its mind the question whether it was necessary to make such an order when an ordinary criminal prosecution could well serve the purpose, the detaining authority must satisfy the Court that the question too was borne in mind before the order of detention was made. If the detaining authority fails to satisfy the Court that the

> detaining authority so bore the question in mind, the Court would be justified in drawing the inference that there was no application of mind by the detaining authority to the vital question whether it was necessary to preventively detain the detenu."

14. Undoubtedly, in the case in in hand, the petitioner has raised the point about failure on the part of the detaining authority to consider the issue of sufficiency of the criminal prosecution. However, the fact remains that the grounds in support of the detention order as well as the affidavit in reply filed by the detaining authority refer to as many as 200 trips by the detenu since the year 1997 to Dubai. The same also refer to acquaintance of the detenu with the Oman Air Lines' employees coupled with the fact that the detenu on interception on 6.2.2004 was found in possession of the foreign currency equivalent to Rs.18 lacs while he was in the process to smuggle out of India without any such declaration regarding the said currency to the Customs authorities. While issuing the order of detention, the detaining authority having considered the fact of attempt to smuggle the foreign currency out of India by the

detenu worth Rs.18 lacs being Indian currency and the over all conduct of the detenu, it can safely be concluded that in the facts and circumstances of the case even the failure to consider the possibility of launching of prosecution would not vitiate the order of detention. It is always to be borne in mind that such an order of detention is not by way of punishment but it is to prevent the unlawful activities which are prejudicial to the economy of the country. Taking into consideration the same thing and bearing in mind the decision of the Apex Court in Kanchanlal's case, the requirement of consideration of possibility for launching criminal prosecution, would depend on facts of each case and the case in hand cannot be said to be one such case when the consideration of the said complaint was absolutely necessary and the non-consideration thereof, would vitiate the order of detention.

15. It is also to be noted that, as rightly submitted by the learned advocate for the respondents that the impugned order of detention and the grounds in support thereof find corroboration from the statements of the detenu himself, it was sought to be argued on behalf of

the petitioner by referring to para 23 of the grounds that the statements given by the detenu cannot be retracted while it was a contention on behalf of the respondents that retraction was in relation to the initial statement i.e. the statement recorded on 6.2.2004. However, there was no retraction in relation to the statements recorded on 12.2.2004 and 25.2.2004.

16. Para 23 of the grounds for detention reads thus -

> "I have carefully gone through the retractions made by you and the rebuttal replies filed by the Department and have considered the same. I do not find any merit in your retraction application."

Referring to the expression "retractions" and "rebuttal replies" in the above quoted para 23 of the grounds, it was contended on behalf of the petitioner that it would clearly reveal that the detenu had retracted all the statements and not only one statement as said to be contended on behalf of the respondents. We are unable to accept this contention made on behalf of the petitioner. The plain reading of para 23 would disclose that there

was only one application for retraction which contained retractions of the statements made by the detenu in his statement which was referred to in the retraction application and the same was replied by the department. The expression "replies" by the department, in para 23 obviously refers to "retractions" in the retraction application by the detenu. It was sought to be argued on behalf of the petitioner that the respondents should have disclosed this fact in the affidavit with necessary clarity. However, it is to be noted that there is no ground taken by the petitioner in the writ petition to the effect that there was any retraction made by him in relation to the subsequent statements or that the same was not considered by the detaining authority while passing the detention order. In case the petitioner wanted the respondents to explain the contents of para 23 in that regard, it was necessary for the petitioner to raise a specific ground in that respect in the petition. Mere submission across the bar would not require the

respondents to come out with any affidavit in reply to such contention sought to be raised on behalf of the petitioner in the course of the argument. Besides, the contents of para 23 clearly refer to "retraction

application" and not to the "retraction applications" as such. Undoubtedly, the retraction in relation to the statement recorded on 6.2.2004 was given on 7.2.2004. Being so, it would refer to only one statement i.e. statement of 6.2.2004 and retraction application filed on 7.2.2004 obviously relate to the statement made subsequent to 7.2.2004. Being so, the contention that the statements of 12.2.2004 and 25.2.2004 were retracted, cannot be accepted without any contention in that regard being raised in the petition and even no material being placed before us by the petitioner. The learned advocate for the respondents, in that regard, has also justified in drawing attention to the decision of the Apex Court in the matter of **Meena Jayendra Thakur v/s Union of India & ors., reported in (1999) 8 SCC 177,** wherein, while dealing with the issue as to whether the subjective satisfaction of the detention order can be issued for the statements recorded under Sec.108 of the Customs Act or not, had held that once statements were not retracted no fault can be found with the detention order passed on the

basis of such statements. In that case, the High Court had rejected the contention on behalf of the detenu that the statements made and recorded under Sec. 108 of the

Customs Act cannot form the sole basis for subjective satisfaction of the detaining authority for the order of detention. While refusing to interfere in the said finding of the High Court, it was observed that, apart from the retracted statements, further statements which are not retracted clearly justified the order of detention. Once it is apparent that the statements of 12.2.2004 and 25.2.2004 were not retracted and in those statements the detenu had confirmed the facts stated in the statement of 6.2.2004, no fault can be found with the satisfaction arrived by the detaining authority on the basis of the statement of detenu recorded under Sec.108 of the Customs Act on 12.2.2004 and 25.2.2004.

17. For the reasons recorded, therefore, we do not find any case having been made out for interference in the order of detention passed by respondents under Sec.3(1) of the COFEPOSA Act and, therefore, the petition fails and is hereby dismissed. Needless to say that, all the observations made herein are in relation to the order of detention and the criminal court dealing with criminal

prosecution against the detenu shall not be influenced by the same in any manner.

18. Rule is discharged with no order as to costs.

(R.M.S. KHANDEPARKAR, J.)

(P.V. KAKADE, J.)